Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 8 February 2024[1]

Case C-174/23

HJ,
IK,
LM
v
Twenty First Capital SAS

(Request for a preliminary ruling from the Cour de cassation (Court of Cassation, France))

(Reference for a preliminary ruling – Freedom of establishment – Alternative investment fund managers (AIFMs) – Directive 2011/61/EU – Operating conditions – Article 13 – AIFM remuneration policies and practices – Scope *ratione temporis*)

1. Directive 2011/61/EU[2] introduces a harmonised and strict framework for regulating and supervising the activities of alternative investment fund managers ('AFIMs') within the European Union.

2. Among the measures for which it provides, Directive 2011/61 requires that the Member States impose on AFIMs the obligation to establish and maintain, for certain categories of employee, remuneration policies and practices that are consistent with sound and effective risk management (Article 13).

3. That obligation extends to employees whose professional activities have a material impact on the risk profiles of the alternative investment funds ('AIFs') they manage.

4. The dispute giving rise to this request for a preliminary ruling lies between an AIFM and a number of its partners and concerns the remuneration agreed under a contract of 27 June 2014. The French courts of first instance and appeal declared that contract void on the ground of non-compliance with the requirements laid down in the national rules transposing Directive 2011/61.

5. The Cour de cassation (Court of Cassation, France), which must give final judgment in the matter, asks the Court of Justice to rule on the applicability *ratione temporis* of certain provisions of Directive 2011/61 in relation to the contract with which the dispute is concerned.

[1] Original language: Spanish.

[2] Directive of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ 2011 L 174, p. 1). I shall refer to this as 'Directive 2011/61' or 'the AIFM Directive'.

6. This request for a preliminary ruling thus affords the Court of Justice the opportunity to interpret Directive 2011/61 with a view to determining the point in time from which AIFMs incur the obligation to comply in full with the remuneration requirements laid down in Article 13 thereof.

I. Legislative framework

A. European Union law

1. Directive 2011/61

7. In accordance with recital 24:

'In order to address the potentially detrimental effect of poorly designed remuneration structures on the sound management of risk and control of risk-taking behaviour by individuals, there should be an express obligation for AIFMs to establish and maintain, for those categories of staff whose professional activities have a material impact on the risk profiles of AIFs they manage, remuneration policies and practices that are consistent with sound and effective risk management. Those categories of staff should at least include senior management, risk takers, control functions, and any employees receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers.'

8. Article 1 ('Subject matter') provides:

'This Directive lays down the rules for the authorisation, ongoing operation and transparency of the managers of alternative investment funds (AIFMs) which manage and/or market alternative investment funds (AIFs) in the Union.'

9. In accordance with paragraph 1 of Article 4 ('Definitions'):

'For the purposes of this Directive, …

…

(b) "AIFMs" means legal persons whose regular business is managing one or more AIFs;

…'

10. Paragraph 1 of Article 6 ('Conditions for taking up activities as AIFM') provides:

'Member States shall ensure that no AIFMs manage AIFs unless they are authorised in accordance with this Directive.

AIFMs authorised in accordance with this Directive shall meet the conditions for authorisation established in this Directive at all times.'

11. Paragraph 1 of Article 7 ('Application for authorisation') reads:

'Member States shall require that AIFMs apply for authorisation from the competent authorities of their home Member State.'

12. Article 12 ('General principles'), contained in Section 1 ('General requirements') of Chapter III ('Operating conditions for AIFMs'), provides:

'1. Member States shall ensure that, at all times, AIFMs:

(a) act honestly, with due skill, care and diligence and fairly in conducting their activities;

…

(e) comply with all regulatory requirements applicable to the conduct of their business activities so as to promote the best interests of the AIFs or the investors of the AIFs they manage and the integrity of the market;

…'

13. Article 13 ('Remuneration') states:

'1. Member States shall require AIFMs to have remuneration policies and practices for those categories of staff, including senior management, risk takers, control functions, and any employees receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on the risk profiles of the AIFMs or of the AIFs they manage, that are consistent with and promote sound and effective risk management and do not encourage risk-taking which is inconsistent with the risk profiles, rules or instruments of incorporation of the AIFs they manage.

The AIFMs shall determine the remuneration policies and practices in accordance with Annex II.

2. [The European Securities and Markets Authority ('ESMA')] shall ensure the existence of guidelines on sound remuneration policies which comply with Annex II. …'

14. In accordance with paragraph 1 of Article 61 ('Transitional provisions'):

'AIFMs performing activities under this Directive before 22 July 2013 shall take all necessary measures to comply with national law stemming from this Directive and shall submit an application for authorisation within 1 year of that date.'

15. Article 66 ('Transposition') provides:

'1. By 22 July 2013, Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

2. Member States shall apply the laws, regulations and administrative provisions referred to in paragraph 1 from 22 July 2013.

…'

16. In accordance with Article 70 ('Entry into force'), Directive 2011/61 entered into force on the twentieth day following its publication in the *Official Journal of the European Union*, which took place on 1 July 2011.

2. ESMA Guidelines

17. Pursuant to Article 13(2) of Directive 2011/61, ESMA adopted 'Guidelines on sound remuneration policies under the UCITS Directive' (ESMA/2013/232), published on 3 July 2013 and corrected on 30 January 2014. [3]

B. National law. Code monétaire et financier [4]

18. Ordonnance No 2013-676 du 25 juillet 2013 modifiant le cadre juridique de la gestion d'actifs, [5] which transposed Directive 2011/61 into French law, entered into force on 28 July 2013.

19. In particular, Order No 2013-676 amended the code monétaire et financier and introduced Article L. 533-22-2, the substance of which is as follows:

– Section I reproduces, in essence, Article 13 of Directive 2011/61, in that it requires AIFMs to determine the policies and practices for the remuneration of, inter alia, managers and members of their board of directors or their management board, when their professional activities have an impact on the risk profiles of the asset management companies or AIFs they manage.

– The last paragraph of Section II states that the terms of the remuneration policies and practices of AFIMs are to be set by a regulation adopted by the [French] Financial Markets Authority ('the AMF').

20. Article 33(I) of Order No 2013-676 contains a transitional provision whereby 'management companies performing, on the date of publication of this Order, activities as provided for in the provisions contained herein shall apply for authorisation as asset management companies … by 22 July 2014'.

21. An explanatory note to Décret No 2013-687 du 25 juillet 2013 pris pour l'application de l'ordonnance No 2013-676 [6] states the following:

'Entry into force: management companies carrying out activities as provided for in the provisions mentioned in the present Decree on the date of its publication shall take all the necessary measures to comply with its provisions and shall submit an appropriate application for authorisation by no later than 22 July 2014 …'

[3] Unless I am mistaken, none of those guidelines relate to the specific matter at issue in this request for a preliminary ruling, which ESMA will address when answering certain questions from economic operators. The guidelines are available at https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-232_aifmd_guidelines_on_remuneration_-_en.pdf.

[4] Monetary and Financial Code.

[5] Order No 2013-676 of 25 July 2013 amending the legal framework for asset management (JORF No 173 of 27 July 2013); 'Order No 2013-676'.

[6] Decree No 2013-687 of 25 July 2013 implementing Order No 2013-676. Published on 30 July 2013.

II. Facts, dispute and questions referred for a preliminary ruling

22. The company Twenty First Capital SAS managed a number of collective investment schemes and at least one AIF.

23. On 27 June 2014, Twenty First Capital concluded a partnership agreement [7] providing for various remunerations in favour of IK, HJ and LM. [8]

24. On 18 August 2014, Twenty First Capital obtained authorisation as an AIFM under Directive 2011/61.

25. On 12 November 2015, Twenty First Capital communicated to IK, HJ and LM its refusal to honour the partnership agreement, [9] on the ground that honouring it would put it in a position of regulatory non-compliance.

26. On 24 December 2015 and 6 January 2016, HJ and IK [10] brought an action against Twenty First Capital, before the tribunal de grande instance de Paris (Regional Court, Paris, France), for enforcement of the partnership agreement and the payment of damages. By a counterclaim, Twenty First Capital sought a declaration as to the nullity of that agreement.

27. By judgment of 10 January 2019, the tribunal de grande instance de Paris (Regional Court, Paris) annulled the partnership agreement on the ground that it did not comply with the national rules transposing Directive 2011/61 and dismissed the applicants' claims. [11]

28. On appeal, the cour d'appel de Paris (Court of Appeal, Paris, France) confirmed the judgment at first instance on 8 February 2021. [12]

29. IK, HJ and LM brought an appeal on a point of law against the judgment on appeal before the Cour de cassation (Court of Cassation).

7 That agreement was preceded by a number of corporate transactions. In March 2014, the company R Participations, established by HJ and having LM and IK as partners, sold three collective investment schemes specialising in investments in emerging markets ('R funds') to Company T by way of a transfer of business. HJ became an employee of Company T. With a view to organising the transfer of that business to the company Twenty First Capital, the parties concerned entered into various agreements, including that, of 27 June 2014, giving rise to the present dispute. Subsequently, on 24 October 2014, Company T sold part of its business, including the R funds, to Twenty First Capital. On 11 December 2014, HJ joined Twenty First Capital as a board member, managing director and second most senior manager of that company.

8 The order for reference proceeds on the premiss that those persons were employees whose professional activities were capable of having a significant impact on the risk profile of the funds they were managing. The remuneration provided for in the partnership agreement included a fixed sum to be paid in four annual instalments (Article 2) and a variable sum based on operating profits (Article 3).

9 According to IK, HJ and LM, that communication took place a few days prior to the deadline for making the first payment, and in it Twenty First Capital expressed its refusal to pay them the sums owed to them under Articles 2 and 3 of the partnership agreement.

10 LM participated as a voluntary intervener in those proceedings.

11 The tribunal de grande instance de Paris (Regional Court, Paris) stated that Twenty First Capital was an AIFM managing at least one AIF and that, for that reason, the remuneration provided for in the partnership agreement had to comply with Article L. 533-22-2 of the Monetary and Financial Code and Article 319-10 of the General Regulation of the AMF. Those provisions, it went on to say, fell within the scope of public policy rules designed to order society ('ordre public de direction') (paragraph 4 of the order for reference).

12 The cour d'appel de Paris (Court of Appeal, Paris) found that 'the remunerations provided for in Articles 2 and 3 of the partnership agreement do not comply with the rules laid down in the AIFM Directive, given, in particular, that they are variable and not performance-based, and, moreover, that the variable remuneration laid down in Article 3 was not confined to the first year. It follows from this that the partnership agreement is unlawful, from the point of view of both the rules laid down by the financial law and Article 1128 of the former Civil Code'.

30. In the view of the Cour de cassation (Court of Cassation), it falls to be determined, by way of an interpretation of Article 13 and Article 61(1) of Directive 2011/61, whether Article L. 533-22-2 of the Monetary and Financial Code, which entered into force on 28 July 2013, was applicable on the date on which the partnership agreement was concluded (27 June 2014).

31. It notes in that regard that there are three documents, issued by the European Commission, [13] ESMA [14] and the AMF [15] respectively, which might help determine the scope *ratione temporis* of the provisions of Directive 2011/61 and the national transposing legislation.

32. However, any conclusions drawn from those documents are inconsistent when it comes to the date of entry into force of the requirements under Article 13 of Directive 2011/61:

– The Commission document appears to acknowledge the existence of a one-year transitional period, ending on 21 July 2014, during which the obligations arising from Directive 2011/61 are not legally binding. [16]

– The EMSA and AMF documents, on the other hand, indicate that AIFMs are subject to the rules (of national and EU law) governing remuneration from the date on which they obtain authorisation.

33. The national court also looks at another possible interpretation, based on whether or not the remuneration was agreed before or after Directive 2011/61 was transposed into French law.

– In the first scenario (agreements concluded before Directive 2011/61 was transposed into national law), 'it might be conceded that it is difficult to ask AIFMs to call immediately into question remuneration which was not in breach of any rules when it was agreed'. They might, at most, be called upon to expend their best efforts to comply with the new remuneration requirements.

– In the second scenario (agreements concluded after Directive 2011/61 was transposed into national law), it might be argued that 'the entry into force of the national legislation transposing the AIFM Directive immediately prohibits AIFMs from henceforth agreeing remuneration that is contrary to the rules laid down in that directive once it has entered into force'.

[13] AIFMD Q&As from the European Commission, available at https://finance.ec.europa.eu/system/files/2017-05/aifmd-commission-questions-answers_en.pdf.

[14] Questions and answers relating to Directive 2011/61, published by ESMA, available at https://www.esma.europa.eu/sites/default/files/library/esma34-32-352_qa_aifmd.pdf.

[15] *Guide AIFM – Rémunération des gestionnaires de fonds d'investissement alternatif* (AIFM Guide – Remuneration of alternative investment fund managers), available at https://www.amf-france.org/fr/actualites-publications/publications/guides/guides-professionnels/guide-aifm-remuneration-des-gestionnaires-de-fonds-dinvestissement-alternatif.

[16] During that transitional period, AIFMs are expected only to expend their best efforts to comply with the requirements of the national legislation transposing Directive 2011/61.

34. On the ground that none of those solutions is self-evident, the Cour de cassation (Court of Cassation) has referred the following questions to the Court of Justice for a preliminary ruling:

'(1) (a) Are [Article 13 and [Article] 61(1) of [Directive 2011/61] to be interpreted as meaning that managers performing activities under [that directive] before 22 July 2013 are required to comply with the obligations relating to remuneration policies and practices:

(i) at the expiry of the period for transposition of that directive[;]

(ii) at the date of entry into force of the provisions transposing the [directive] into national law[;]

(iii) from the expiry of the period of one year, expiring on 21 July 2014, referred to in Article 61(1); or

(iv) from the time of obtaining authorisation as manager under the [directive]?

(b) Does the answer to this question depend on whether the remuneration paid by the AIFM to an employee or a director was agreed before or after:

(i) the expiry of the period for transposition of that directive;

(ii) the date of entry into force of the provisions transposing the [directive] into national law;

(iii) the expiry on 21 July 2014 of the period laid down in Article 61(1) of the [directive];

(iv) the date on which the AIFM obtained its authorisation?

(2) If it follows from the answer to Question (1) that, following the transposition of the [directive] into national law, an AIFM is, for a certain period of time, only obliged to make its best efforts to comply with the national legislation resulting from [that directive], does it fulfil that obligation if, during that period, it hires an employee or appoints a director on terms of remuneration which do not comply with the requirements of the national provision transposing Article 13 of the [directive]?'

III. Procedure before the Court of Justice

35. The request for a preliminary ruling was registered at the Court of Justice on 21 March 2023.

36. Written observations have been submitted by HJ, IK and LM (jointly), Twenty First Capital, the French Government and the Commission.

37. It was not considered necessary to hold a hearing.

IV. Assessment

A. Applicability of Directive 2011/61

38. According to HJ, IK and LM, the dispute does not fall within the scope *ratione materiae* of Directive 2011/61, since it relates to remuneration not linked to AIF management activities. [17]

39. As we all know, requests for a preliminary ruling on the interpretation of EU law enjoy a presumption of relevance. It is, moreover, for the national court to define under its own responsibility the factual and legal framework, the accuracy of which it is not for the Court of Justice to ascertain. The latter may refrain from ruling on such a request only in exceptional circumstances which the Court of Justice has spelled out. [18]

40. Now, in this case, the referring court states that, by virtue of the reason for which it was payable, the remuneration at issue fell within the scope of Directive 2011/61 and the national transposing legislation. [19]

41. On that basis, which the Court of Justice must respect, none of the circumstances that might rule out the applicability of the directive with which the request for a preliminary ruling is concerned is present.

B. Preliminary observation

42. In accordance with the third paragraph of Article 288 TFEU, a directive is to be binding, as to the result to be achieved, upon each Member State to which it is addressed, but is to leave to the national authorities the choice of form and methods.

43. Directives are addressed to (and are binding on) Member States and do not, in principle, have the capacity to impose enforceable obligations directly on individuals or to be relied upon against them. [20]

44. Directive 2011/61 has the particular feature of imposing an obligation on AIFMs performing activities (under that directive) before 22 July 2013. [21] Article 61(1) thereof requires AIFMs to take 'all necessary measures to comply with national law stemming from this Directive' and to submit an application for authorisation within one year of that date.

[17] In their view, since the remuneration at issue is owed to them by reason of the sale and subsequent management of a type of fund other than an AIF, the rules of Directive 2011/61 are inapplicable to them.

[18] Thus, where it is quite obvious that the interpretation of EU law sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the question submitted to it. See, inter alia, judgment of 14 September 2023, *TGSS (Refusal of the maternity supplement)* (C-113/22, EU:C:2023:665, paragraphs 30 and 31).

[19] The request for a preliminary ruling refers expressly in that regard to the assessments carried out by the national courts of first instance and of appeal. See footnotes 11 and 12 to this Opinion.

[20] Judgment of 12 July 2022, *Nord Stream 2* v *Parliament and Council* (C-348/20 P, EU:C:2022:548, paragraph 66 and the case-law cited).

[21] In the interests of simplicity, I shall refer to 'AIFMs performing activities under this Directive before 22 July 2013' (the expression used in Article 61(1) of Directive 2011/61) as 'AIFMs active before 22 July 2013'.

45. In keeping with the particular nature of directives, to which I have referred above, it must be assumed that it is for the Member States to ensure that AIFMs comply with Directive 2011/61 in relation to their authorisation, the performance of their activities and the transparency of their management of AIFs.

C. Question 1(a)

46. The referring court asks the Court of Justice to specify the date from which 'managers performing activities under … [Directive 2011/61] before 22 July 2013 are required to comply with the obligations relating to remuneration policies and practices'.

47. In accordance with Article 13 of Directive 2011/61, Member States are to require AIFMs to apply to certain categories of employee remuneration policies and practices [22] that are consistent with and promote sound and effective risk management. It is expected that those policies and practices will 'not encourage risk-taking which is inconsistent with the risk profiles, rules or instruments of incorporation of the AIFs they manage'.

48. Article 66 of Directive 2011/61 details how its content is to be transposed into domestic law:

– Paragraph 1 thereof states that Member States must *adopt and publish* by 22 July 2013 the laws, regulations and administrative provisions necessary to comply with the directive itself. [23]

– According to paragraph 2 thereof, 'Member States shall apply the laws, regulations and administrative provisions referred to in paragraph 1 from 22 July 2013'.

49. A combined reading of Article 13(1) and Article 66(1) and (2) of Directive 2011/61 shows that Member States were under an obligation to require AIFMs to adopt remuneration policies and practices consistent with sound and effective risk management and in accordance with Annex II to that directive as from 22 July 2013.

50. That general regime is nonetheless accompanied by a transitional provision for 'AIFMs performing activities under [Directive 2011/61] before 22 July 2013'. Those AIFMs 'shall take all necessary measures to comply with national law stemming from this Directive and shall submit an application for authorisation within 1 year of that date'. [24]

51. The inclusion of the transitional regime for AIFMs which were *already performing* activities falling within the scope of Directive 2011/61 (before 22 July 2013) is particularly relevant to this dispute. It means, subject to the reservation which I shall set out, that AIFMs *were not under an immediate obligation* to comply in every respect with the provisions of Directive 2011/61 concerning the remuneration of their most senior employees.

[22] On the material scope of that obligation, I refer to paragraph 47 et seq. of the judgment of 1 August 2022, *HOLD Alapkezelő* (C-352/20, EU:C:2022:606; 'the judgment in *HOLD Alapkezelő*').

[23] This is confirmed by recital 6 of Commission Implementing Regulation (EU) No 447/2013 of 15 May 2013 establishing the procedure for AIFMs which choose to opt in under Directive 2011/61 (OJ 2013 L 132, p. 1).

[24] Article 61(1) of Directive 2011/61.

52. I infer from the foregoing premiss that the first two scenarios posited by the referring court must be ruled out: the remuneration obligations incumbent on AIFMs active before 22 July 2013 were not triggered 'at the expiry of the period for transposition of that directive' (scenario (i)) or 'at the date of entry into force of the provisions transposing the [directive] into national law' (scenario (ii)).

53. I recognise that the wording of Article 61(1) of Directive 2011/61 is not without ambiguity, inasmuch as the expression 'within 1 year of that date [22 July 2013]' could be interpreted as having either of the two meanings given to it in scenarios (iii) and (iv) put forward by the referring court.

54. It falls to be determined, therefore, whether AIFMs active before 22 July 2013 were under an obligation, from that date until 22 July 2014, either to take the measures necessary to comply with their obligations and submit an application for authorisation, or only to submit an application for authorisation.

55. The interpretation of a provision of EU law requires account to be taken not only of its wording, but also of its context, and the objectives and purpose pursued by the act of which it forms part. [25]

56. Article 61(1) of Directive 2011/61 must be viewed in conjunction with Article 13(1) and Article 66(1) and (2) thereof. A combined reading of those provisions shows, as I have already said, that Member States were under an obligation to require AIFMs to adopt remuneration policies and practices consistent with sound and effective risk management as from 22 July 2013.

57. However, it was the intention of the EU legislature to provide a transitional regime for AIFMs that were already performing activities falling within the scope of Directive 2011/61. The transitional period was intended to allow AIFMs in that category to adjust *gradually* to the requirements of the directive itself.

58. An analysis of the context in which Article 61 of Directive 2011/61 sits highlights the importance of the authorisation system which that directive introduces. The referring court specifically asks whether a link may be established 'between obtaining authorisation and submitting to the rules arising from the directive'. [26]

59. Member States must ensure that no AIFMs manage AIFs unless they are authorised in accordance with Directive 2011/61. AIFMs authorised in accordance with that directive must meet the conditions for authorisation established in Directive 2011/61 *at all times*. [27]

60. The information which AIFMs must provide to the competent authorities in order to obtain authorisation specifically includes information 'on the remuneration policies and practices pursuant to Article 13'. [28]

[25] See, inter alia, the judgment in *HOLD Alapkezelő*, paragraph 42 and the case-law cited.

[26] Paragraph 26 of the order for reference.

[27] Article 6(1) of Directive 2011/61.

[28] Article 7(2)(d) of Directive 2011/61.

61. That authorisation is not to be granted 'unless … [the competent authorities] are satisfied that the AIFM *will be able* to meet the conditions of [that] Directive'. [29] Once authorisation is granted, AIFMs may manage AIFs with investment strategies described in their application for authorisation in their home Member State. [30]

62. Article 61(1) of Directive 2011/61 also requires that AIFMs active before 22 July 2013 submit an application for authorisation, in accordance with the conditions described in that directive, within one year of that date.

63. It follows from Articles 7, 8 and 61 of Directive 2011/61 that AIFMs active before 22 July 2013 were not required to comply in full with the obligations in respect of remuneration laid down in that text before obtaining the prescribed authorisation.

64. On the contrary, those obligations are enforceable against such AIFMs once that authorisation has been granted to them by the competent national authorities following an assessment of the capacity of the AIFMs to comply *in the future* with the provisions contained in Directive 2011/61. Furthermore, if, as I have already said, authorisation is an essential prerequisite for acting as an AIFM, it follows that the remuneration policy prior to the date of authorisation should not be subject to the same strict conditions as that applicable thereafter.

65. I therefore agree with IK, HJ, LM and the French Government that the obligations incumbent on AIFMs active before 22 July 2013 were fully enforceable as from the date on which the competent national authorities authorised their activity. [31] From that point onwards, any AIFM (whether it was active before 22 July 2013 or took up its activity after that date) is subject in every respect to the ordinary rules of law laid down in Directive 2011/61.

66. Such an interpretation does not compromise the achievement of the objectives pursued by Directive 2011/61.

67. The Court of Justice has stated that those objectives are '(i) the protection of investors, in particular where their interests may conflict with those of fund managers as regards both risk and the durability of investment decisions and (ii) the stability of the financial system'. [32]

68. The Court of Justice has also stated that 'the remuneration policies and practices governed by Directiv[e] 2011/61 are intended, in that context, to promote sound and effective risk management and not to encourage risk-taking which is inconsistent with the risk profiles, rules or instruments of incorporation of the … AIFs'. [33]

[29] Article 8(1)(a) of Directive 2011/61. Emphasis added.

[30] Third subparagraph of Article 8(5) of Directive 2011/61. AIF management may be allowed to start earlier, subject to the conditions described in that same provision.

[31] According to the Commission, the transitional period extends until the last day of the year following the entry into force of Directive 2011/61, whether or not the AIFM has been authorised. What is more, it proposes that the same approach be taken in respect of the entirety of that period, which is to say that the obligations arising from that directive do not become binding until the end of that period. See, in that regard, the content of the Commission's reply as reproduced in footnote 45 to this Opinion.

[32] Judgment in *HOLD Alapkezelő*, paragraph 52, concerning Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 2009 L 302, p. 32), as amended by Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 (OJ 2014 L 257, p. 186), and Directive 2011/61.

[33] Judgment in *HOLD Alapkezelő*, paragraph 54. According to recital 24 of Directive 2011/61, the purpose so served is to avoid 'the potentially detrimental effect of poorly designed remuneration structures on the sound management of risk and control of risk-taking behaviour by individuals'.

69. Those objectives do not, in my view, suffer from the fact of granting AIFMs active before 22 July 2013 a transitional period of adjustment that lasts until they receive the prescribed authorisation. Their eligibility for that transitional period also provides a means of reconciling the achievement of those objectives with the need for legal certainty.

70. There are at least two arguments which support that position:

– First, during the transitional adjustment period, AIFMs were not exempt from any obligations under Directive 2011/61. As I shall explain subsequently, they were required to take measures that were not inconsistent with the national legislation arising from that directive. [34]

– Second, as the Commission has noted, the objective pursued by Article 61(1) of Directive 2011/61 was to give AIFMs active before 22 July 2013 some time to be able to make preparations to comply with the (new) requirements for obtaining authorisation which had been introduced by that directive.

71. In short, AIFMs active before 22 July 2013 were required to comply in full with the obligations arising from that directive only as from the point of obtaining the (prescribed) authorisation which they were required to seek within one year of that date. Remuneration paid after such authorisation had been obtained was required to comply with Article 13(1) of Directive 2011/61.

72. That same interpretation is supported by ESMA, the authority to which Directive 2011/61 gives a 'general coordinating role'. [35] Article 13(2) of that directive entrusts ESMA with the task of drawing up 'guidelines on sound remuneration policies which comply with Annex II'. [36]

73. ESMA states that, once authorisation has been obtained, the AIFM must submit to the rules of Directive 2011/61 and the Remuneration Guidelines, which apply as from the point of obtaining authorisation. [37]

74. It is to be noted that, further to that view, ESMA goes on to say that, as far as variable remuneration is concerned, the rules of Directive 2011/61 have binding force in respect of the financial year subsequent to the date on which authorisation was granted. [38]

D. Question 1(b)

75. The referring court wishes to ascertain how the dispute might be impacted by the fact that the remuneration paid by the AIFM was granted before or after any of the dates which it puts forward as potential scenarios (which are the same as those referred to in Question 1(a)).

[34] I shall refer to these in my reflections on the second question referred for a preliminary ruling.

[35] Recital 73 of Directive 2011/61.

[36] See point 17 of this Opinion.

[37] Answer 1 to the first question in Section I ('Remuneration') contained in the ESMA document cited in footnote 14 to this Opinion: 'According to Article 61(1) of the AIFMD, AIFMs performing activities under the AIFMD before 22 July 2013 have one year from that date to submit an application for authorisation. Once a firm becomes authorised under the AIFMD, it becomes subject to the AIFMD remuneration rules and the Remuneration Guidelines. Therefore, the relevant rules should start applying as of the date of authorisation'.

[38] According to that same reply, the 'AIFMD regime on variable remuneration should apply only to full performance periods and should first apply to the first full performance period after the AIFM becomes authorised'.

76. To my mind, the date on which the remuneration was agreed is immaterial for the purposes of this case. [39] Since the expression of contractual intent does not take precedence over legislative intent, the application of Article 13(1) of Directive 2011/61 cannot be made to depend on that subjective element.

77. I am once again in agreement with ESMA in that assessment: the date of the agreement on remuneration is not the decisive factor. According to ESMA, the rules on variable remuneration contained in its guidelines [40] applied once authorisation was obtained by the AIFM. [41]

78. The proposition I am putting forward is consistent with the case-law of the Court of Justice as expressed below:

– 'In principle, a new rule of law applies from the entry into force of the act introducing it. While it does not apply to legal situations that have arisen and become definitive under the old law, it applies to the future effects of a situation which arose under the old rule, as well as to new legal situations. It is otherwise – subject to the principle of the non-retroactivity of legal acts – only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application'. [42]

– 'As regards, more specifically, directives, it is, as a general rule, only legal situations existing after the expiry of the time limit for the transposition of a directive which may be brought within the scope *ratione temporis* of that directive'. [43]

– 'That applies a fortiori to legal situations which arose under the old rule and which continue to produce effects after the entry into force of the national measures taken to transpose a directive after the expiry of the time limit for its transposition'. [44]

79. In my opinion, the payment of remuneration arising from an agreement concluded at a point in time when an AIFM active before 22 July 2013 did not yet have the prescribed authorisation constitutes one of the possible future effects of a situation which arose under a previous rule. There is therefore no reason why the new rule (Directive 2011/61) should not extend to remuneration accruing as from the point at which that directive becomes fully effective, irrespective of the date of the previous *inter partes* agreement.

E. Intermediate conclusion

80. In the light of the foregoing, I take the view that, in accordance with Article 13 and Article 61(1) of Directive 2011/61, Member States were under an obligation to require AIFMs active before 22 July 2013 to comply in full with the obligations relating to remuneration policies and practices as from the date on which they obtained authorisation to act as AIFMs.

[39] Whether the contractual intent reflected in the relevant agreements is effective *inter partes* as from the conclusion of those agreements is a different matter. What is at issue is not how the terms of those agreements are to be interpreted, but whether the remuneration paid by the AIFM is subject to the regulatory framework at one point in time or at another.

[40] In particular, Sections XI and XII of those directives.

[41] In answer 1 to the first question contained in Section I of the document cited in footnote 14 to this Opinion, ESMA reasserts that view and applies it to two 'examples' corresponding to different dates for the end of the accounting year and the acquisition of authorisation.

[42] Judgment of 22 June 2022, *Volvo and DAF Trucks* (C-267/20, EU:C:2022:494, paragraph 32).

[43] *Ibidem*, paragraph 33.

[44] *Ibidem*, paragraph 34.

F. Question 2

81. The referring court asks this question in the event that 'it follows from the answer to Question (1) that, following the transposition of the [directive] into national law, an AIFM is, for a certain period of time, only obliged to make its best efforts to comply with the national legislation resulting from [that directive]'.

82. On that basis, the question raised is as follows: 'Does [the AIFM] fulfil that obligation if, during that period, it hires an employee or appoints a director on terms of remuneration which do not comply with the requirements of the national provision transposing Article 13 of [Directive 2011/61]?'

83. As I have just explained, Member States were under an obligation to require AIFMs active before 22 July 2013 to comply in full, as from the date of obtaining the prescribed authorisation, with the remuneration policies and practices imposed by that directive and the transposing national legislation.

84. I have also noted that Article 61(1) of Directive 2011/61 establishes a transitional regime applicable to AIFMs active before 22 July 2013. During that transitional period, AIFMs were required to take 'all necessary measures to comply with national law stemming from [Directive 2011/61]'.

85. Doubts now arise as to the meaning of that expression (*take all necessary measures*) in relation to compliance with the obligations relating to remuneration policies and practices.

86. In particular, the issue is whether or not conduct contrary to Article 13 of Directive 2011/61 *but adopted* before the grant of authorisation is consistent with Article 61(1) of that directive.

87. To my mind, from 22 July 2013, AIFMs already active at that time were under an obligation (in relation to remuneration policies and practices) the binding effect of which was less extensive than that attaching to it as from the acquisition of authorisation.

88. The transitional regime under Article 61(1) of Directive 2011/61, read in conjunction with Article 13 thereof, lies half way between a *total exemption* from compliance with the remuneration policies and practices arising from Directive 2011/61 and a *full requirement* of strict compliance with those policies and practices.

89. The point of balance between full subjection and total exemption may be established, as the Commission suggests, [45] on the basis that, during that transitional period, Article 61(1) of Directive 2011/61 operates a 'best efforts' clause. The EU legislature sought only to ensure that *efforts* be made in that regard, not to lay down specific results which had to be achieved. [46]

90. To my mind, that interpretation not only respects the exceptional nature of the transitional regime (and reconciles it with the need for legal certainty) but is also consistent with the objective pursued by Directive 2011/61.

[45] The Commission's 'Q&As' document cited in footnote 13 to this Opinion reads: 'During the one year transitional period, AIFMs are expected to comply, on a best efforts basis, with the requirements of the national law transposing the AIFMD'.

[46] As regards the distinction between obligations as to means and obligations as to results, see judgment of 16 March 2023, *Beobank* (C-351/21, EU:C:2023:215, paragraph 53).

91. That transitional regime must therefore be interpreted as meaning that AIFMs active before 22 July 2013 were under an obligation to adapt their practices *gradually* to the rules of Directive 2011/61. Conversely, those rules were fully binding on AIFMS that were not engaged in any activity subject to Directive 2011/61 on that date.

92. Only conduct which *manifestly* deviates from those rules in the period between 22 July 2013 and the date of authorisation may be regarded as contrary to Article 61(1) of Directive 2011/61, read in conjunction with Article 13 thereof.

93. To my mind, that interpretation is the most consistent within the context in which those and other provisions of Directive 2011/61 sit. In particular, as the French Government submits:

– The first of the principles relating to the operational requirements applicable to AIFMs is that they should 'act honestly, with due skill, care and diligence and fairly in conducting their activities'. [47]

– Although AIFMs active before 22 July 2013 were required to comply in full with the obligations arising from Directive 2011/61 as from the point of acquiring authorisation, they were not permitted to engage in activities that would run the risk of weakening the implementation of the legislative framework established by that directive. The objective of ensuring a high level of protection for investors would otherwise be undermined.

94. In short, AIFMS performing activities under Directive 2011/61 before 22 July 2013 were not allowed to engage in conduct, after that date and before obtaining authorisation, which *manifestly* deviated from the best efforts to be expected of them during that period.

V. Conclusion

95. In the light of the foregoing, I propose that the answer to the questions raised by the Cour de cassation (Court of Cassation, France) should be as follows:

Article 13 and Article 61(1) of Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010

are to be interpreted as meaning that:

– Member States were under an obligation to require alternative investment fund managers engaged in activities under Directive 2011/61 before 22 July 2013 to comply in full with the obligations relating to remuneration policies and practices arising from that directive as from the date of obtaining the authorisation they were required to seek within one year from 22 July 2013.

– Conduct on the part of the aforementioned alternative investment fund managers (engaged in activities under Directive 2011/61 before 22 July 2013) that was adopted after 22 July 2013 but before authorisation was obtained may be regarded as contrary to Article 13 and Article 61(1) of that directive if it manifestly entailed a risk of weakening the implementation of the legislative framework established by that directive.

[47] Article 12(1)(a) of Directive 2011/61.